FILED
DEC 20 19
HAROLD B. WILLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 490

LEE KWOCK DUN, BY HIS NEXT FRIEND, LEE YOU POY,
Petitioner,

vs.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JACK WASSERMAN,
Warner Bldg.,
Washington, D. C.,
Attorney for Petitioner.

NATHANIEL S. RUVELL,
Of Counsel.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	2
Reasons for Granting The Writ	4
Conclusion	8

CITATIONS

Cases:

Alabama Title and Trust Co. v. *Millsap,* 71 F. 2d, 518 (C. A. 5, 1934)	5
Bridges v. *Wixon,* 326 U. S. 135 at 155-156 (1945)	7
Brown v. *Peterson,* 25 App. D. C. 359, 363 (1905)	6
Chesapeake and Ohio Railway Co. v. *Martin,* 283 U.S. 209 (1931)	4
DeGregorio v. *United States,* 7 F. 2d, 295, 296 (C.A. 2, 1925)	7
Dyer v. *MacDougall,* 201 F. 2d, 265, 269 (C. A. 2, 1952)	6
Foran et al. v. *Commissioner of Internal Revenue,* 165 F. 2d, 705 (C.A. 5, 1948)	5
Gibson v. *Southern Pacific Co.,* 67 F. 2d, 758 (C. A. 5, 1933)	5
Gordon v. *United States,* 344 U. S. 414 (note 13)	7
Joseph v. *Village of Downers Grove,* 104 F. 2d, 974 (C. A. 7, 1939), certiorari denied, 308 U. S. 605	6
Loesch & Green Const. Co. v. *Commissioner of Internal Revenue,* 211 F. 2d 210 (C. A. 6, 1954)	6
Mar Gong v. *Brownell,* 209 F. 2d 448, (C. A. 9, 1954)	7
National Labor Relations Board v. *Ray Smith Transport Co.,* 193 F. 2d, 142 (C. A. 5, 1951)	5
National Labor Relations Board v. *Howell Chevrolet Co.,* 204 F. 2d, 79 (C. A. 9, 1953), affirmed on other grounds, 346 U. S. 483	6
Nicholas v. *Davis,* 204 F. 2d, 200 (C. A. 10, 1953)	4

Page

Pence v. *United States*, 316 U. S. 332, 339, 340 (1942) . 4
Pennsylvania R. Co. v. *Chamberlain*, 288 U. S. 333, 341 (1933) 6
San Francisco Ass'n for the Blind v. *Industrial Aid*, 152 F. 2d, 532, 536 (C. A. 8, 1946) 5
Stone v. *Stone*, 136 F. 2d, 761, 764 (C.A.D.C, 1943) ... 6
Takehara v. *Dulles*, 205 F. 2d, 560, 562 (C. A. 9, 1953) . 7
Twentieth Century-Fox Film Co. v. *Dieckhaus*, 153 F. 2d, 893 (C. A. 8, 1946), certiorari denied, 329 U. S. 716 ..... 5, 7
United States v. *Johnson*, 208 F. 2d, 729 (C. A. 5, 1953) 5
United States v. *Ross*, 92 U. S. 281, 283 (1875) 7
Woodward v. *United States*, 167 F. 2d, 774 (C.A. 8, 1948) 7
Wynne v. *Boone*, 191 F. 2d, 220 (C. A. D. C., 1951) ... 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No.

LEE KWOCK DUN, BY HIS NEXT FRIEND, LEE YOU POY,
Petitioner,

vs.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming a judgment entered herein for the respondent and dismissing petitioner's claim to American citizenship.

Opinions Below

The unreported oral opinion of the District Court is set forth at pages 105-107 of the record. The opinion in the Court of Appeals is contained at page 9, *infra* (Appendix A.)

Jurisdiction

The judgment of the Court of Appeals was entered on November 18, 1954 (p. 9, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Where it was conceded that an American citizen was the father of an American child born abroad, and the uncontradicted and unimpeached testimony of the father and his brother, both present at the child's birth, identified petitioner as that child, was the trier of fact at liberty to disregard such testimony?

2. Where improper considerations, (i. e., failure to produce cumulative testimony of a brother, lack of resemblance to his father, failure to reside with his father, and collateral inconsistencies) were given weight by the District Court in rejecting petitioner's claim to American citizenship, was it proper for the Court of Appeals to affirm the District Court's ruling?

Statutes Involved

Revised Statutes, Section 1993 (2 Stat. 153) in force from April 14, 1802, until May 24, 1934 (48 Stat. 797, 8 U. S. C. 6), provides as follows:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Statement

This action is for a declaratory judgment to establish petitioner's citizenship, pursuant to 8 U. S. C. 903.

Petitioner, Lee Kwock Dun, was born in China on December 27, 1932. The Government admitted in the Courts below that Lee You Poy, an American citizen at birth and a World War II veteran, had a son by the name of Lee Kwock Dun, who was born in China (R. 22, 94-95). Both Lee You Poy and an uncle of petitioner, testified without contradiction or impeachment that the petitioner was the Lee Kwock Dun born to Lee You Poy, and that they were present in China at his birth. (R. 90-95; 50-59). As the son of an American citizen, petitioner would be an American citizen, although born abroad, under Revised Statute 1993 (8 U. S. C. 6). Petitioner's uncle testified further that he recognized petitioner by his facial features and a scar between his eyebrows sustained at the age of five when both were in the same household in China. (R. 53). Petitioner identified his father and was not contradicted as to any details relative to his place or date of birth, or his parents. (R. 25-36). Blood tests were compatible with the claimed relationship. (R. 95). Nevertheless, the Courts below sustained a finding that petitioner was not the son of Lee You Poy and therefore not a citizen under Revised Statutes 1993 (8 U. S. C. 6) because he failed to produce a brother one year older as a witness, because he failed to resemble his father, because he did not reside with his father in the United States and because of inconsistent statements by petitioner upon collateral matters, such as the height of his school house in China, the composition of the village gates, the direction of Toyshan City from his native village, and other collateral matters. (R. 106-107). No assertion was made by the Courts below that the credibility of petitioner's witnesses was in any wise questioned. The Circuit Court's per curiam decision, implicitly, finds that if the District Court utilized erroneous standards, then "no substantial rights" were affected. (Appendix A, p. 9).

Reasons for Granting the Writ

1. There is here presented a wide conflict of decisions by Circuit Courts of Appeal upon a vital rule of evidence in the trial of civil, criminal, and administrative law cases.

In the instant case there wasn't one iota of proof inconsistent with the testimony of petitioner's father and uncle that petitioner was the Lee Kwock Dun born abroad to the father. Inference, surmise and suspicion alone were utilized to rebut the uncontradicted evidence of birth. At least five Circuits hold that such uncontradicted evidence may not be disregarded.

In *Chesapeake and Ohio Railway Co.* v. *Martin,* 283 U. S. 209 (1931) this Court said:

> "The witness was not impeached or contradicted. His testimony is positive and direct, and not incredible upon its face. It was the duty of the court and jury to give credit to his testimony."

See also: *Pence* v. *United States,* 316 U. S. 332, 339, 340 (1942).

The Fifth, Sixth, Seventh, Eighth and Tenth Circuits, following the *Chesapeake & Ohio Railway Co.* case, adhere to the rule that uncontradicted and unimpeached credible testimony may not be disregarded.

The conclusive effect of uncontradicted testimony of even interested witnesses was recently acknowledged in *Nicholas* v. *Davis,* 204 F. 2d 200 (C. A. 10, 1953) where the Court said:

> "When controlling, positive and uncontradicted evidence is introduced, and when it is unimpeached by cross-examination or otherwise, is not inherently improper, and no circumstances reflected in the record cast a doubt on its verity, then under the principles laid

down in *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U. S. 209, 51 S. Ct. 453, 75 L. Ed. 983, it may not be disregarded, even though adduced from interested witnesses, and no question of credibility or issue of fact is presented for determination by the jury."

In *Twentieth Century Fox Film Co.* v. *Dieckhaus*, 153 F. 2d 893 (C. A. 8, 1946, certiorari denied 329 U. S. 716) the Court declared:

". . . the law does not permit the oath of credible witnesses testifying to matters within their knowledge to be disregarded because of suspicion that they may be lying. There must be impeachment of such witness or substantial contradiction, or, if the circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point . . ."

See also: *San Francisco Ass'n for the Blind* v. *Industrial Aid*, 152 F. 2d 532, 536 (C. A. 8, 1946). The rule of the Fifth Circuit is set forth in *United States* v. *Johnson* 208 F. 2d 729 (C. A. 5, 1953); *National Labor Relations Board* v. *Ray Smith Transport Co.*, 193 F. 2d 142 (C. A. 5, 1951); *Foran et al.* v. *Commissioner of Internal Revenue*, 165 F. 2d 705 (C. A. 5, 1948); *Gibson* v. *Southern Pacific Co.*, 67 F. 2d 758 (C. A. 5, 1933) and *Alabama Title and Trust Co.* v. *Millsap*, 71 F. 2d 518 (C. A. 5, 1934).

In *National Labor Relations Board* v. *Ray Smith Transport Co., supra*, the Court declared:

". . . Although the circumstances may support the inference of a fact, if it is shown by direct unimpeached, uncontradicted, and reasonable testimony which is consistent with the circumstances that the fact does not exist, no lawful finding can be made of its existence . . ."

The rule in the Sixth Circuit, is set forth in *Loesch & Green Const. Co.* v. *Commissioner of Internal Revenue,* 211 F. 2d 210 (C. A. 6, 1954) and that of the Seventh is announced in *Joseph* v. *Village of Downers Grove,* 104 F. 2d 974 (C. A. 7, 1939, certiorari denied, 308 U. S. 605).

To the contrary, however, are the views of the Second, Ninth and District of Columbia Circuits. *Dyer* v. *MacDougall,* 201 F. 2d 265, 269 (C. A. 2, 1952); *National Labor Relations Board* v. *Howell Chevrolet Co.,* 204 F. 2d 79 (C. A. 9, 1953; affirmed on other grounds, 346 U. S. 483); *Wynne* v. *Boone,* 191 F. 2d 220 (C. A. D. C., 1951). The District of Columbia Circuit originally announced that the trier of facts could not arbitrarily disregard unimpeached and uncontradicted testimony. *Brown* v. *Peterson,* 25 App. D. C. 359, 363 (1905); *Stone* v. *Stone,* 136 F. 2d 761, 764 (C. A. D. C., 1943). A long line of cases beginning in 1905 was overruled in 1951 when *Wynne* v. *Boone, supra,* was decided. The Ninth Circuit refers to the rule requiring acceptance of uncontradicted testimony as "an ancient fallacy which somehow persists despite the court's numerous rulings to the contrary." *National Labor Relations Board* v. *Howell Chevrolet, supra,* at page 86.

Whether the rule is indeed an ancient fallacy or whether the trier of fact may not arbitrarily disregard unimpeached, uncontradicted credible evidence is an important problem in the law of evidence, frequently arising in numerous civil, criminal and administrative trials and hearings, which should be settled by this Court.

2. Apart from the foregoing, there is here involved the erroneous standards applied by the District Court which the Circuit Court approved. This Court has observed that a rebuttable inference "must necessarily yield to credible evidence of the actual occurrence." *Pennsylvania R. Co.* v. *Chamberlain,* 288 U. S. 333, 341 (1933).

The courts below relied upon inference and suspicion to overcome the affirmative testimony as to petitioner's paternity and his American citizenship. Inferences adverse to petitioner were drawn as a result of: (1) *His failure to produce the cumulative testimony of a brother, one year older.* The Second Circuit holds to the contrary, that unfavorable inferences may not be drawn "when the uncalled witness is purely cumulative, and when he was not in a better position to know the facts than those who were called." *DeGregorio* v. *United States,* 7 F. 2d 295, 296 (C. A. 2, 1925). (2) *His non-resemblance to his father.* Evidence of family resemblance or non-resemblance has little, if any, probative value. *Woodward* v. *United States,* 167 F. 2d 774 (C. A. 8, 1948). (3) *His failure to reside with his father in the United States.* No inference of fact can be drawn from such circumstances. At most, it gives rise to a choice of probabilities which does not constitute evidence. *United States* v. *Ross,* 92 U. S. 281, 283 (1875). (4) *Inconsistent statements upon collateral matters.* Petitioner was cross-examined on such matters as the height of his school house in China, composition of the village gates, direction of Toyshan City from his native village, and other collateral matters. Contrary to *Gordon* v. *United States,* 344 U. S. 414 (note 13) and over objections (R. 39, 95), independent evidence was introduced to show prior inconsistent statements on these matters. In any event, the proof of such inconsistent statements should not have been given probative value. *Twentieth Century Fox Film Co.* v. *Dieckhaus, supra.*

Suspicion and surmise, resulting from adverse inferences drawn on the four grounds noted above motivated the District Court to award judgment for respondent (R. 106-107). Application of these erroneous standards would have been basis for a reversal in the Ninth Circuit. *Takehara* v. *Dulles,*

205 F. 2d 560, 562 (C. A. 9, 1953). *Mar Gong* v. *Brownell*, 209 F. 2d 448 (C. A. 9, 1954).

The District of Columbia Circuit in its ruling below, disregarded the erroneous rulings of the trial court noted above and found that they did not violate "substantial rights". It is a matter of speculation as to how the District Court would have decided this case, had it not drawn erroneous inferences. See *Bridges* v. *Wixon*, 326 U. S. 135 at 155-156 (1945). The conflict between the Ninth and District of Columbia Circuits as to when substantial rights are affected is an important one which should be resolved by this Court.

Conclusion

It is therefore respectfully submitted that this petition for a writ of certiorari be granted.

JACK WASSERMAN,
Warner Bldg.,
Washington, D. C.,
Attorney for Petitioner.

NATHANIEL S. RUVELL,
Of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title]

Decided November 18, 1954.

* * * * *

Before Edgerton, Bazelon, and Danaher, Circuit Judges.

Per Curiam: The plaintiff Lee Kwock Dun brought this suit against the Attorney General for a declaratory judgment that the plaintiff is a citizen of the United States. The District Court, after a hearing, entered judgment for the defendant. We find no error affecting substantial rights.

Affirmed.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Argument	9
Conclusion	14

CITATIONS

Cases:

Chesapeake & Ohio Ry. Co. v. *Martin*, 283 U. S. 209 — 11

Comstock v. *Group of Investors*, 335 U. S. 211 — 10

Flynn ex rel. Yee Suey v. *Ward*, 104 F. 2d 900 — 11

Go Lun v. *Nagle*, 22 F. 2d 246 — 12

Nicholas v. *Davis*, 204 F. 2d 200 — 11

Quock Ting v. *United States*, 140 U. S. 417 — 10

Won Ying Loon v. *Carr*, 108 F. 2d 91 — 13

Yee Suey, Flynn ex rel. v. *Ward*, 104 F. 2d 900 — 13

Statute:

Immigration and Nationality Act, 66 Stat. 163:

Section 403 (a) (42), 66 Stat. 280, 8 U. S. C. 903 — 3

Section 405 (a), 66 Stat. 280, 8 U. S. C. 1101 note — 3

Nationality Act of 1940, Section 503, 54 Stat. 1137, 1171, 8 U. S. C. (1946 ed.) 903 — 2

328285—55

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 490

LEE KWOCK DUN, BY HIS NEXT FRIEND, LEE YOU POY, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (Pet. 9) is not yet reported. The oral opinion of the District Court appears in the appendix record (Ap. 105–107).[1]

[1] References preceded by "Ap" are to pages in the printed appendix record which is on file with this Court. Defendant's Exhibit 1 (Ap. 95–96), the transcript of testimony before the Immigration Board of Special Inquiry, is part of the certified record on file with this Court but has not been printed.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1954. The petition for a writ of certiorari was filed on December 20, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, in an action to declare that petitioner possesses derivative United States citizenship as the foreign born son of a United States citizen, the circumstances reflected in the record justified the trial court in finding that petitioner failed to sustain his burden of proof.

STATUTE INVOLVED

Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. (1946 ed.) 903, provides in pertinent part:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judg-

ment declaring him to be a national of the United States. * * *

STATEMENT

On February 5, 1951, petitioner began this action in the District Court for the District of Columbia, pursuant to Section 503 of the Nationality Act of 1940,[2] seeking a declaratory judgment that he is a citizen of the United States by virtue of the citizenship of one Lee You Poy, whom he claimed to be his father (Ap. 107–109). Following trial before Judge Schweinhaut, the District Court concluded that petitioner had failed to establish the alleged relationship (Ap. 105–107, 112), and entered judgment for defendant (Ap. 113). The Court of Appeals (per Edgerton, Bazelon, and Danaher, J. J.) unanimously affirmed, *per curiam,* finding "no error affecting substantial rights" (Pet. 9).

The facts pertinent to the issues raised in the petition for certiorari may be summarized as follows:

Petitioner was born in China in 1932 (Ap. 108, 110). He arrived in the United States on December 29, 1948, and sought admission as a United

[2] Section 503 of the Nationality Act of 1940 was repealed by Section 403 (a) (42) of the Immigration and Nationality Act, 66 Stat. 163, 280, 8 U. S. C. 903, effective December 24, 1952. However, the action in the instant case, having been instituted on February 5, 1951, is not affected by the repeal. See Section 405 (a) of the Immigration and Nationality Act, 66 Stat. 280, 8 U. S. C. 1101 note.

States citizen (*ibid.*). In 1949, following hearings before a Board of Special Inquiry at San Francisco, California (D. Ex. 1; Ap. 95–96), petitioner was ordered excluded from the United States on the ground that he was an alien not in possession of a valid immigration visa (Ap. 108, 109, 110). After the Board of Immigration Appeals had affirmed (*ibid.*), petitioner brought this action for a declaratory judgment.

At the hearing in the District Court, the following testimony was developed (Ap. 21–96):

a. *Petitioner's testimony.*—Petitioner testified that Lee You Poy was his father, and that his mother was Ton Shee, who is still in China (Ap. 25). He also testified that Lee Yin Wai and Lee You Fon were his uncles, the latter living in Chicago (Ap. 26). He further testified that when he was five years old he had a fall which produced a scar between his eyebrows (Ap. 27).

On cross-examination, petitioner admitted that his father had left China when petitioner was about two years old and that he had not seen him thereafter until his arrival in this country (Ap. 27–28, 30). Although he, his father and his older unmarried brother lived in Chicago, they had never lived together, always residing at separate places in the city (Ap. 31, 82–84). During his cross-examination, the following inconsistencies between petitioner's current testimony and his prior testimony before the Board of Special

Inquiry (D. Ex. 1, Ap. 95–96; Cf. Ap. 97–105) were developed:

He testified that between the ages of seven and seventeen, he, together with his brother, had attended a Chinese school, at which they roomed and boarded (Ap. 32–34, 36, 44). At the exclusion hearings, he had testified that he had lived and dined at home while attending school (Ap. 34–36; see also Ap. 57). Although his testimony at the exclusion hearing was that the school building was one story high, he testified before the court that it was a two-story building (Ap. 36, 40–43). He testified that during the time he attended school there were between 40 and 50 pupils and two teachers (Ap. 44–45). When his attention was called to his having testified at the exclusion hearings that there were three teachers, he explained that a third teacher was employed as an "extra" to help the other "two out if necessary" (Ap. 44–46).[3] Although he had previously testified that he and his family fled to the hills about ten or fifteen times as a result of Japanese threats to invade his village, and that the Japanese did invade it on one occasion, he testified before the court that he fled the village only about three or four times and that there had been no actual invasion of his village (Ap. 46–48). Although he had previously testified that

[3] Although, at the exclusion hearings, he did not know the name of his own teacher, he was able to remember it in his testimony in the District Court (Ap. 46).

he had lived with his paternal grandmother in China and that he did not remember his paternal grandfather, he testified before the trial court that he had never lived with the grandmother and that he knew his grandfather, who died when petitioner was five or six years old (Ap. 64–66, 67, 68, 88). Petitioner's testimony also conflicted with his former testimony with respect to the geographical location of his village, his knowledge of the existence of a nearby village, the presence of a rice-pounder in his house, the number of dwellings in the row in which his house was located, the description of the gates in his home village, and bidding his brother farewell when the latter left China for the United States (Ap. 69–72, 73–74, 89–90, 75–80, 89, 80–82; see also Ap. 54–55, 56–57).

b. *Testimony of Lee You Poy.*—Lee You Poy, who admittedly is a citizen of the United States, testified that he and his brother, Lee You Fon, were present in China in 1932 when his wife, as the Government conceded, gave birth to a son named Lee Kwock Dun (Ap. 94–95). He then testified that petitioner was that son, even though he admitted that he had left China in 1934 and since that time had been continuously in the United States (Ap. 94, 92), and thus had not seen his own boy since the latter was a baby.

c. *Testimony of Lee You Fon.*[4]—Lee You Fon

[4] The surname Fon is erroneously spelled as Ton in certain portions of the record (see Ap. 93).

testified that he was the brother of Lee You Poy and that he was present when the latter's wife gave birth to a son, named Lee Kwock Dun (Ap. 50–52). He also testified that the first time he saw petitioner in the United States was in 1949, and that he recognized him as Lee Kwock Dun by his appearance and by a scar between his eyebrows occasioned by a fall at the age of five when they were both living in the same house in China (Ap. 54, 53).

At the conclusion of the testimony, the trial court expressed the opinion that petitioner's burden in this case "has definitely not been carried" (Ap. 105). Declaring that he was not making "a résumé of all the testimony in here, and all the considerations which enter into [his] thinking and decision", the trial judge stated (Ap. 105–107):

> I do think the boy's testimony, as contrasted with what apparently was his testimony in substance, and certainly in its important elements before the Board of Special Inquiry, is really replete with inconsistencies, some of which, in my own mind, I just can't understand at all, because the thing he would know most about are those things which would naturally impress themselves most on the mind of a child, and it is as to those things he has made inconsistent statements in many respects.
>
> Apart from the inconsistencies in his own testimony here and in San Francisco, it is

the testimony of his uncle, which is rather specific, and the testimony of his father, which was anything but specific. All his father testified to was that he married and had a child and this is his son. He did not say anything else that helped the Court at all.

* * * * *

You would not, I think, normally expect to find, especially in a case of a son, or sons, whom you bring from China, and whom he hasn't seen for ten years, and with whom he had not communicated for ten years, to go to the expense, trouble and effort to get him over here, and as soon as they arrive they are on their own, no evidence even of communication back and forth after they got here. There is no evidence of any kind of any filial relationship at all among the members of these families.

* * * * *

* * * The father doesn't look any more like that boy, much more like that boy than I do. I do not suggest that in itself proves anything. I have two daughters, one of whom you couldn't mistake for my daughter, and the other one looks nothing like me, and the one who doesn't look like me looks like her mother. They are both my daughters. There isn't any question about it. I was there at their birth and preceding their birth, so I haven't any doubt about it, so that doesn't prove anything by itself, but when you take that, along with the other

> elements in the whole picture, and I think it must be taken into consideration, surely the burden must be fairly strong upon an alleged father to establish the paternity of an alleged son.
>
> * * * * *

The trial judge also noted that petitioner failed to call his alleged older brother as a witness (Ap. 107).

The District Court thereupon found that petitioner "is not the son of Lee You Poy", concluding that petitioner "failed to sustain the burden of proving that he is a citizen of the United States" (Ap. 112). Accordingly, it ordered judgment for respondent (Ap. 113), which the Court of Appeals unanimously affirmed (Pet. 9).

ARGUMENT

Review by this Court of the decision of the Court of Appeals is unnecessary because the issue here presented is factual, depending entirely on the credibility of witnesses who appeared personally before the district judge.

1. This fact issue has been unanimously determined adversely to petitioner by both the District Court and the Court of Appeals.[5] Under

[5] Similar fact determinations were also made by two administrative agencies, the Board of Special Inquiry and the Board of Immigration Appeals (Ap. 108, 109, 110). The District Court's finding was based on a *de novo* determination on the basis of the testimony and evidence adduced before it.

the familiar "two-court rule", there is no occasion for further review by this Court, since the record amply supports the findings adverse to petitioner on the issue of credibility. See cases collected in *Comstock* v. *Group of Investors,* 335 U. S. 211, 214.

2. Petitioner contends (Pet. 4–6) that the courts below, in holding that he had not satisfactorily established the paternity upon which his claim to United States citizenship is based, erroneously failed to apply the general rule that unimpeached and uncontradicted testimony may not be arbitrarily disregarded by the trier of facts. This contention is without merit. The general rule with respect to uncontradicted testimony is not inexorable. As this Court stated with respect to this very type of case in *Quock Ting* v. *United States,* 140 U. S. 417, 420–421:

> Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit

> his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced.

See also *Chesapeake & Ohio Ry. Co.* v. *Martin,* 283 U. S. 209, 216; *Flynn ex rel. Yee Suey* v. *Ward,* 104 F. 2d 900, 902 (C. A. 1). The very cases upon which petitioner relies (Pet. 4–6) recognize that uncontradicted positive testimony is not conclusive with respect to an issue unless it is not "inherently improper", and "no circumstance reflected on the record casts doubt on its verity." See *Nicholas* v. *Davis,* 204 F. 2d 200, 202 (C. A. 10); and *Chesapeake & Ohio Ry. Co.* v. *Martin, supra.* This is not such a case. Here the trial court made clear that on the whole record it found that the circumstances did cast substantial doubt on the verity of petitioner's testimony.

Petitioner separates various of the factors mentioned by the trial court and then argues that each in itself does not overcome the testimony in his behalf (Pet. 6–7). The trial court made it clear, however, that, while it was enumerating some of the factors which it considered, its ultimate determination that petitioner had not met the burden of proof was based on the entire record (Ap. 105–107). While none of the factors mentioned by the trial court might in and of itself

be sufficient to raise doubts with respect to the testimony offered by petitioner, the trier of fact was justified, under the decisions cited above, in finding that, in totality, they kept petitioner's proof from rising to the degree of positiveness which would support his affirmative case.

The numerous inconsistencies between petitioner's testimony before the Board of Special Inquiry and his testimony in the District Court clearly justified the trier of facts in discrediting his entire testimony, especially since, as the trial court observed, the testimony involved matters "which would naturally impress themselves most on the mind of a child" (Ap. 105). The inconsistencies in the testimony were not irrelevant, for they related to the issue of petitioner's identity as the son of Lee You Poy. Even if the inconsistent testimony had related to purely collateral matters, it would be relevant, in cases of the instant type, at least for purposes of impeachment. *Go Lun* v. *Nagle,* 22 F. 2d 246, 247 (C. A. 9). Lee You Poy's ability to identify petitioner as his son was so inherently improbable, in view of his not having seen his son since the latter's infancy, that it was not unreasonable for the trier of facts to disregard his testimony with respect to such identity. Nor was it unreasonable for the trial court to infer the non-existence of any filial relations between petitioner and Lee You Poy,

from the fact that they were not living together in the United States and from the absence of evidence that, after a separation of some fourteen years, they had had any social relations with each other. It was also not improper for the trial court to consider petitioner's failure to call his alleged older brother as a witness, since petitioner had testified that for some time they had lived together and had attended school together in China, whereas the alleged father and uncle whom petitioner did call had not seen him since infancy or early childhood. The testimony of the brother would thus not have been merely cumulative. Cf. *Won Ying Loon* v. *Carr,* 108 F. 2d 91 (C. A. 9); *Flynn ex rel. Yee Suey* v. *Ward,* 104 F. 2d 900 (C. A. 1).[6]

The finding of the District Court was based on correct legal principles, is amply supported by the record, and was concurred in by the Court of Appeals. There is, therefore, no occasion for further review by this Court.

[6] The trial court did not, as petitioner claims (Pet. 7), draw an adverse inference from the total absence of any resemblance between petitioner and his alleged father. It merely noted that fact as not being of any aid to petitioner in overcoming the other unfavorable inferences against his claim (Ap. 106–107).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
EDWARD S. SZUKELEWICZ,
Attorneys.

JANUARY 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955